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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 350

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County,
Defendant in Error.

Brief for Plaintiff in Error.

JOSIAH PATTERSON,
For Plaintiff in Error.

PATTERSON, NEELY & HENDERSON,
PAM, CALHOUN & GLENNON,
Of Counsel.

E. H. TROTT & CO., PRS. & LITHO. MEMPHIS

27814

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No. 356

AMERICAN STEEL AND WIRE COMPANY,
Plaintiff in Error,
vs.
R. A. SPEED, Clerk of the County Court of Shelby County,
Defendant in Error.

Statement, Assignments of Error, Brief and Argument for Plaintiff in Error.

STATEMENT.

A fair and comprehensive statement of the case will be found in the opinion of the Supreme Court of Tennessee (Record, p. 165). Its findings are as follows:

> "This suit was instituted in the Chancery Court of Shelby county to recover $1,031.44, a merchant's tax assessed against complainant by R. A. Speed, clerk of the County Court of that county, and which was paid by complainant under protest, on the 18th of October, 1902. The chancellor rendered a decree in favor of complainant, and the cause is now in this court on appeal of the defendant clerk.
>
> "The facts upon which the controversy arises are as follows:
>
> "Complainant is a corporation created under the laws of New Jersey. Its situs is in the State of New Jersey, and its principal business office is situated at Chicago, Ill. It is engaged in the manufacture of

nails, staples, barbed and smooth wire, at different points north of the Ohio river. None of its manufactories are situated in Tennessee, and all of its products consigned to Memphis are shipped from points beyond the limits of this State.

"Prior to the first of February, 1900, its manufactured products were sold and distributed throughout the Southwest from Louisville, Ky.; Memphis, Tenn.; Greenville, Vicksburg, and Natchez, Miss.; and New Orleans, La. About that time the Patterson Transfer Company, a corporation created under the laws of Tennessee, having its situs at Memphis, and doing business at Memphis, represented to appellee that Memphis was the most available point in the Southwest at which to mass and distribute its manufactured products to its customers in that section. At this time, and for many years prior thereto, the Patterson Transfer Company had been engaged in the business of transferring passengers and freights to and from the various depots at Memphis, and from the landings on the Mississippi river. Appellee entered into an arrangement with the Patterson Transfer Company, whereby said company was to receive its manufactured products at Memphis, assort them so as to separate the different kinds of nails, staples and wire, and then to deliver them, either to the jobbers at Memphis, or to the jobbers beyond the limits of Tennessee, over the various lines of railroads and steamboats running into Memphis, as directed by complainants.

"None of complainant's products are ever sold to the Patterson Transfer Company, or are by it sold to others, and neither its officers or employes have any knowledge whatever of the price at which goods are sold by complainant. Under the arrangement between them, the business of the Patterson Transfer Company, in connection with complainant's products, is confined to their transfer to the warehouses, their assortment in the warehouses, the keeping of them in storage, and their subsequent delivery to the customers of the complainant, under its general or special orders, as below indicated.

"The goods of complainant are manufactured at different points, and it is convenient and useful, from a business point of view, to mass them at some place

at which they can be assorted, and from which they can be distributed to complainant's customers. It is impracticable to assort the goods either at the river landing or at the railroad depots when they reach Memphis, and, in order to facilitate the work, the Patterson Transfer Company has rented three warehouses in which the goods are stored for the purpose of assortment and distribution, and for other purposes below indicated. These warehouses are rented exclusively for this purpose, and the manufactured products of complainant, and no other goods, are stored therein.

"The evidence further shows that, as a general rule, prior to the time the goods are shipped to Memphis, sales agents of the complainant canvass the Southwestern country, and make contracts exclusively with jobbers; and in each instance where a contract is made, it is embodied in writing, on a form prepared by complainant, in which is set down the amount of goods which constitutes the subject of the contract, and the time agreed upon within which they are to be delivered. The goods so contracted for are described as so many kegs of nails, so many kegs of staples, so many reels of barbed wire, or so many coils of smooth wire, according to the terms of the contract, in respect of the quantity agreed upon. But the contract does not specify the grade and quality of the goods desired. The grade and quality are left open, to be subsequently specified when the customer desires a delivery, as below stated. The customer can, when he makes his specification, select any grade of goods he desires, and, upon so selecting, they will be delivered to him, up to the quantity contracted for, within the time agreed upon, at prices contracted for applicable to the several grades. In fixing the price of its goods, the complainant always, except when necessary to lower prices in order to meet competition, figures in the freight on the goods.

"As above indicated, it is shown in the evidence that there are many different kinds of nails, as well as different kinds of barbed and smooth wire, and it is expressly stipulated in the contract that the customer shall have the privilege of specifying, during the life of the contract, the kind of wire, or kind of nails or

staples he desires delivered to him under the contract. These contracts also specify from sixty to ninety days as the time within which the products are to be delivered; and at any time during the period prescribed in the contract, the customer may designate the kind of goods he desires delivered under it.

"These contracts are made, usually, before the goods arrive at Memphis, their point of destination, and generally the contracts are made in advance of the production of the goods at the complainant's factory. Usually the sales agents of the complainant, not only in advance of the shipment of the goods, but in advance of their production, canvass the Southwestern country—in the manner above stated—visiting the various jobbers, ascertaining the amount of goods they will require within sixty or ninety days, and the contract is prepared to the purport above indicated, in which the complainant obligates itself to deliver, at the prices stated, as above mentioned, the amount of goods contracted for therein, and the customer agrees to receive and pay for that quantity, upon the goods being delivered to him after he shall have made, and according to, his specification, which he may make during the life of the contract; the customer reserving the right, in the face of the contract, to specify the exact grade or quality of goods he desires delivered under it. He does this after the making of the contract, and at any time he desires to do so, within the life of the contract, by writing out his specification showing precisely what grade of goods he desires, and forwards this specification to the office of complainant in Chicago, and then the goods, under an order from the Chicago office, addressed to the Patterson Transfer Company, at Memphis, are selected by the latter out of the mass of goods belonging to the complainant in the aforesaid warehouses in Memphis, and are shipped by the said Patterson Transfer Company to the customer who has signed the specification. This order from the complainant to the Patterson Transfer Company is effected through the agency of a copy of the specification, which is forwarded to the latter from the complainant's central office at Chicago, it being understood, according to the course of business between the two companies, that the Patterson Transfer

Company will select out of the mass of goods those set out in the specification, and will ship them to the customer whose name is signed to the specification, upon receiving such copy of the specification from the central office at Chicago.

"This method of transacting the business is modified in practice, insofar as the fulfillment of the contracts made with the jobbers at Memphis is concerned. For the convenience of the Memphis trade, complainant advises the Patterson Transfer Company of the names of its customers at Memphis, and that company is instructed to deliver the goods embraced in the contracts with the Memphis jobbers, in the following manner: The Memphis jobber makes out his specification in duplicate, and addresses a letter to complainant, as in any other case; but, instead of forwarding this letter and his specification directly to complainant, he delivers the letter to the Patterson Transfer Company, and the Patterson Transfer Company at once delivers the goods so specified, attaching the dray receipt to a copy of the specification, and forwards the specification, letter and dray receipt to the office of complainant in Chicago, and that office makes out an invoice and sends it directly to the jobber. Another variation is made in the course of the business, in favor of the Memphis jobber, to the following effect: Any jobber in Memphis who is a recognized customer of the complainant can, without any previous written contract, or other special agreement, make out a specification of the goods he desires, and hand this, in duplicate form, to the Patterson Transfer Company. Upon this being done it is the duty of the Patterson Transfer Company, under its general instructions from the complainant, to select out of the mass of goods in the warehouses, goods corresponding to those contained in the specification, and deliver them to such jobber, this delivery being usually made by the next day, or, at most, within two or three days. Other deliveries on specifications sent direct to the Chicago office, are not usually made within less than six or eight days, and sometimes a longer period is required. When the Patterson Transfer Company receives from Memphis jobbers the specifications which are the special subject of this paragraph,

one copy is kept by it, and the other copy is forwarded to the office at Chicago, where, upon its arrival and reception, the customer is charged with the goods specified, at current prices.

"The testimony shows that of the mass of goods kept on hand in Memphis, in the above mentioned warehouses, about ninety per cent. ultimately goes to jobbers who reside outside of Memphis, and beyond the limits of this State. The remaining ten per cent. goes to the Memphis jobbers in fulfillment of the general contracts previously referred to, pursuant to specifications thereunder made, and under specifications made without previous written contracts, the latter covering about two and one-half per cent. of all the goods kept on hand.

"No one but an agreed or recognized customer of the complainant can make out a specification, or have goods delivered from the storehouses of the Patterson Transfer Company; and no goods are ever delivered or distributed to any one by the Patterson Transfer Company except under the express directions of complainant, or under general directions given by complainant to the Patterson Transfer Company, in favor of recognized and approved customers of the complainant, whose names are furnished by it to the Patterson Transfer Company.

"The testimony further shows that the quantity of goods which the complainant keeps on hand at Memphis fluctuates considerably, owing to the state of trade from time to time. Sometimes the stock is as low in value as $30,000, and sometimes the complainant has on hand a stock of the value of more than $100,000.

"Some of the goods, a very small amount, are shipped to Memphis by rail. Nearly all of these goods which come to the hands of the Patterson Transfer Company from this complainant, are transported to Memphis on barges belonging to transportation companies, in which complainant has no interest, and which are engaged in the carrying trade. As a general rule, while the complainant endeavors to secure contracts covering its output before the goods are manufactured, yet it does not always do so; but, taking advantage of the seasons when there is a good

stage of water in the rivers, which must be used in floating its products from its mills to Memphis, it masses its goods at the latter point in anticipation of future sales.

"The testimony shows that when goods are shipped from complainant's mills, consigned to Memphis, the Patterson Transfer Company is notified by the Chicago office that a certain quantity of complainant's products were shipped at a certain time, on barges, to the port of Memphis. These barges are met at the river landing by the Patterson Transfer Company, which receives the goods, transfers them to its warehouses and assorts them. Then, from time to time, it ships the goods on specifications, as before explained. On receiving the goods they are credited to the complainant on the books of the Patterson Transfer Company, and, on being shipped out, they are charged on the same books to the complainant. When the goods reach Memphis they are always consigned to the complainant, in care of the Patterson Transfer Company.

"All the goods forwarded to Memphis are products of the factories of complainant. No part of them are ever purchased by it. Its sales agents are exclusively engaged in selling these products. They are produced by complainant beyond the limits of this State, and are made the subject of contracts by its sales agents throughout the Southwest, in the manner before explained. These sales agents report all contracts effected by them directly to the office in Chicago, whether made with the jobbers at Memphis, or elsewhere beyond the limits of this State. All invoices for goods, when sold by specifications in the manner above stated, are made out at the office at Chicago, and forwarded directly to the customer, in the manner and under the circumstances previously stated.

"Some of complainant's goods are produced at one factory and some at another, and, consequently, when a purchaser contracts for the delivery to him, within sixty or ninety days, of a certain number of packages, it frequently turns out that some of the goods desired are the product of one factory, and some of another, and it is, accordingly, most convenient in the conduct of complainant's business that goods from complainant's various factories should be massed at some point

where they can be dealt with in the manner before explained.

"Complainant's goods are put up in the following original packages: The nails and staples are put up in kegs, each keg weighing 100 pounds; the smooth wire in coils tied by wires, and each coil weighing 100 pounds; the barbed wire on reels, the wire on each reel weighing 100 pounds. Each package is separately and distinctly made up at the factories for convenience of transportation, and is, in this form, delivered to the common carriers. In this form they are delivered at the initial point of transportation. In this form they are transported in barges, or by railroad, to Memphis, and received by the Patterson Transfer Company. In this form they are assorted at the warehouses by the Patterson Transfer Company, and delivered by it to the complainant's customers at Memphis, under the circumstances previously stated, or to the various lines of steamboats and railroads running out of Memphis, consigned, under circumstances previously stated, to customers beyond the limits of Tennessee, and in this form they ultimately come to the hands of complainant's customers in such foreign States. Each package is separate and distinct in itself, and while no particular package is consigned to any special customer, each keg of nails and staples is marked so as to show exactly what the package contains, and each coil and reel of wire is marked with a tag showing what the coil or reel contains, and no package is ever changed in any particular from the time it leaves the factory until it ultimately reaches the hands of the customer.

"The testimony shows that Memphis has, within recent years become, by reason of its accessibility to railway and river transportation, a great distributing point; and it was selected as the basis of the operations which are the subject of the present controversy, by reason of these exceptional advantages.

"Other facts proven by the complainant are as follows: The testimony of Mr. Young, the tax assessor, shows that none of the cotton shipped into Memphis from the surrounding States, pays any tax whatever, and that the manufacturers of lumber in Memphis pay no tax on lumber made from logs which are produced from the soil of this State.

"There is also an agreement of counsel, to the effect that there are large iron deposits in Tennessee, and a number of furnaces in this State engaged in the manufacture of iron from the iron ore deposits in this State.

"The bill alleges, and the answer admits, that complainant was assessed by the defendant clerk as a merchant, and was required to pay to the State a merchant's tax for the years 1901 and 1902, amounting to $1,031.44. On appeal to the State Board of Equalizers, this assessment was affirmed, and, thereupon, within the time required by law, towit, on the 18th day of October, 1902, complainant paid these taxes under protest. This suit was instituted by complainant within the time prescribed by the statute, to recover the taxes so paid, on the ground that the assessment was illegal and void for the following reasons:

"1. Because complainant was never, at any time, a merchant doing business at Memphis.

"2. That the assessment was in violation of Article 1, Section 8, Subsection 3, of the Constitution of the United States, which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and among the Indian tribes.'"

On these findings the Supreme Court of the State held that plaintiff in error was not engaged in interstate commerce, but was a merchant doing business at Memphis, and was rightly and legally assessed to pay a merchant's *ad valorem* tax, and also a merchant's privilege tax. The court entered a decree denying the contention of plaintiff in error, that the assessment and collection of said taxes were in contravention of Article 1, Section 8, Subsection 3, of the Constitution of the United States—reversing the decree of the chancellor and dismissing the bill. Thereupon, plaintiff in error prosecuted a writ of error to the Supreme Court of Tennessee, and, in this court, assigns errors as follow:

ASSIGNMENTS OF ERROR.

I.

THAT IN AND BY SAID DECREE, ENTERED IN THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT WAS NOT IN CONTRAVENTION OF ARTICLE 1, SECTION 8, SUBSECTION 3, OF THE CONSTITUTION OF THE UNITED STATES, WHICH PROVIDES THAT CONGRESS SHALL HAVE POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND AMONG THE INDIAN TRIBES."

II.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT THE SUBJECTS OF INTERSTATE COMMERCE, BECAUSE IMPORTED INTO TENNESSEE IN THE ORIGINAL PACKAGES OF COMMERCE, AND THERE OFFERED FOR SALE IN THE ORIGINAL PACKAGES.

III.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT IN TRANSITU FROM THE INITIAL POINT OR POINTS OF TRANSPORTATION TO THE PLACE OR PLACES WHERE THEY WERE TO BE DELIVERED TO THE PURCHASERS FROM PLAINTIFF IN ERROR.

IV.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT DID NOT OPERATE

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TO DISCRIMINATE BETWEEN PLAINTIFF IN ERROR, A CITIZEN OF THE STATE OF NEW JERSEY, WHOSE GOODS WERE MANUFACTURED OUT OF THE PRODUCE OF OTHER STATES, BECAUSE OF THEIR FOREIGN ORIGIN, AND SIMILAR GOODS MANUFACTURED OUT OF THE PRODUCE OF TENNESSEE.

V.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO DENY THE CLAIM OF PLAINTIFF IN ERROR, THAT SAID ASSESSMENT AND THE COLLECTION OF SAID TAXES THEREUNDER WERE IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, AND TO HOLD THAT SAID ASSESSMENT WAS VALID, AND TO REVERSE THE DECREE OF THE CHANCELLOR, AND TO DISMISS THE BILL OF PLAINTIFF IN ERROR.

Local, Constitutional and Statutory Laws.

Preliminary to the discussion of the assignments of error, it is material to collate the local, constitutional and statutory laws in force in Tennessee, which are deemed pertinent to a discussion of the assignments of error.

While the method of taxing merchants is peculiar in Tennessee, the meaning of the term "merchant" in that State is not different from that given by the lexicographers, and the interpretation given to it by the courts in the administration of the general principles of commercial jurisprudence.

Section 28, Article 2, of the Constitution of Tennessee is as follows:

> "Sec. 28.—*Taxation, Merchants and Privileges.* All property, real, personal or mixed, shall be taxed, but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value, but the Legislature shall have power to tax merchants, peddlers and privileges, in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to non-residents and sent beyond the State, shall not be

taxed at a rate higher than the *ad valorem* tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

Section 3 of "An Act to provide revenue for State, county and municipal purposes," passed by the General Assembly of Tennessee, April 22, 1899, and approved April 24, 1899 (See Acts of 1899, page 1011), is as follows:

"Be it further enacted, That all merchants shall pay an *ad valorem* tax upon the average capital invested by them in their business of 50 cents on the $100, 35 cents of which shall be for State purposes, and 15 cents of which shall be for school purposes; and a privilege tax of 15 cents on each $100 worth of taxable property, 7½ cents of which shall be for school purposes, and 7½ cents for State purposes; Provided, That such privilege tax, without regard to the length of time they do business, shall in no case be less than $5, which $5 is to be paid when the license is taken out, and in case of those whose privilege tax amounts to more than $5, the $5 paid shall be a credit when the balance of the tax is paid; Provided further, That said $5 shall be equally divided between the State and counties."

Section 2 of the same act provides:

"* * * The imposition of a privilege tax under this act shall not be construed as a release or exemption from an *ad valorem* tax, unless otherwise expressly provided. Nor shall this act be construed as repealing any special act heretofore passed imposing a privilege tax."

Section 28 of "An Act to provide more just and equitable laws for the assessment and collection of revenue for State,

county and municipal purposes," etc., passed by the General Assembly of the State of Tennessee, April 21, 1899, and approved April 24, 1899 (See Acts of 1899, page 1107), is as follows:

> "Be it further enacted, That merchants shall pay an *ad valorem* tax upon the capital invested in their business equal to that levied on taxable property. The term 'merchants,' as used in this act, includes all persons, copartnerships, or corporations engaged in trading or dealing in any kind of goods, wares, merchandise, either on land or in steamboats, wharf boats or other craft stationed or plying in the waters of this State, and confectioners, whether such goods, wares or merchandise be kept on hand for sale, or the same be purchased and delivered for profit, as ordered.
>
> "(1) Persons, firms, companies or corporations engaged in the business of merchandising, other than such as are embraced in subsequent subsections of this section, shall be taxed as herein set out. Such persons, firms, companies or corporations shall, at the expiration of the period of the bond provided for in this act, file with the clerk of the County Court of the county, a statement, under oath, showing the amount of capital invested in business to be assessed for taxation, but under no circumstances shall the amount to be assessed be less than the value of the average amount of stock on hand during the preceding year, to be ascertained by adding together the value of the highest amount of stock on hand at any time during said year with the value of the lowest amount of stock on hand at any other time during said year, and dividing the same by two, said statement to be sworn to by such merchant, person, or head of such firm, company or corporation, in which he shall state that he has not reduced his stock for the purpose of escaping taxation at any time, and has fully, truly and correctly, without evasion or reservation, made return as required by law, and said average amount of stock, as sworn to by said merchant, person, firm, company or corporation, shall be deemed the taxable value of the capital of such merchant, person, firm, company or corporation, upon which he shall pay to the County Court

clerk the same tax as levied upon real estate and other property for State, county and municipal purposes. The word 'capital,' as used in this subsection, shall be construed so as to mean the average amount of stock on hand during the year in which it is offered for sale, the amount to be ascertained as provided in this section, but if the average stock on hand is less than the capital stock employed by said merchant, firm or corporation, he shall pay a tax on the capital stock. * * *."

It will be seen that the merchant's privilege tax, and the merchant's *ad valorem*, or property, tax, are separate and distinct taxes, and that the merchant's privilege tax has no application to merchandise purchased and sold beyond the limits of the State. This is the construction placed by the Supreme Court of the State on Section 28, Article 2, of the Constitution.

The Merchants of Memphis v. The City of Memphis, 9 Baxter 76.

Hence it was that as plaintiff in error sold only ten per cent. of its manufactured products consigned to Memphis to jobbers who were residents of Tennessee, and ninety per cent. to jobbers who were residents of other States, plaintiff in error was assessed to pay a property or *ad valorem* tax on the whole amount, and a privilege tax only on ten per cent. of the whole. (See Record, p. 11.)

The only other provisions of local law deemed pertinent have reference to the exemption of products manufactured from the produce of the State.

Section 30, Article 2, of the Constitution of the State, is as follows:

"No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

Subsection 5 of Section 2, of the Assessment Law, exempts from taxation—

> "All growing crops of whatever nature or kind—the direct product of the soil of this State in the hands of the producer or his immediate vendee, and manufactured articles from the produce of this State in the hands of the manufacturer."
>
> See Acts 1899, p. 1084.

Section 23 of the Assessment Law provides as follows: (See Acts of 1899, p. 1100.)

> "* * * That all persons, copartners and joint stock companies engaged in the manufacture of any goods, wares, merchandise, or other articles of value, shall pay an *ad valorem* tax upon the actual cash value of the property, real, personal or mixed, which is used and held for the purpose of manufacturing, preparing, completing and finishing goods, wares and merchandise, and the articles in the manufacture of which the parties aforesaid shall be engaged; Provided, The value of articles manufactured from the produce of the State in the hands of the manufacturer shall be deducted in assessing the property."

It will be noted that there is a marked difference between the assessment of the merchant's tax in Tennessee, and the assessment of all other property. The merchant's tax is assessed by the County Court clerk, whereas, all other property, including the property of manufacturers, is assessed by the county assessor.

Section 5 of the Assessment Law provides as follows: (See Acts of 1899, p. 1085.)

> "Be it further enacted, That the basis of all assessments shall be as follows, towit:
>
> "(1) To assess the property to the person or persons owning or claiming to own the same, on the 10th day of January of the year for which the assessment is made, if known; if not, to unknown parties * * *."

"Each manufacturing corporation, either foreign or domestic, shall pay an *ad valorem* tax upon the actual cash value of its capital stock or corporate property, including its franchises, easements, incorporeal rights and privileges, and all other corporate property, which said value shall not be less than the actual cash value of both its shares of stock and its bonded debt, and which said value shall be computed by looking to and considering the market value, and if no market value, the actual value of such stocks and bonds; Provided, however, that the assessment or taxation of said corporate property or capital stock shall be in lieu of any assessment or taxation of the shares of stock, either to the corporation or to the owners thereof; Provided, also, that the assessed value of the corporate realty and tangible personal property otherwise assessed, and in the case of manufacturers, the value of the articles manufactured from the produce of the State in the hands of the manufacturer, shall, in making the assessment, be deducted from the value of the capital stock or corporate property * * *."

By reference to the Acts of 1901, and also of 1903, it will be seen that the sections from the Acts of 1899, incorporated herein, were carried forward in the subsequent revenue and assessment laws passed by the General Assembly of Tennessee, and were in force at the time the taxes in question were claimed to have accrued.

The Supreme Court of Tennessee has decided that Section 30, Article 2, of the Constitution of the State, exempts articles manufactured from the produce of the State from the payment of an *ad valorem* or property tax, but does not exempt the manufacturer engaged in selling articles manufactured from the produce of the State from the payment of a privilege tax.

Kurth v. State, 2 Pickle 134.

By reference to the assessment law passed by the General Assembly of Tennessee, April 6, 1881, and approved

April 7, 1881 (See Acts of 1881, p. 248), it will be seen that Section 16 of the Assessment Law of 1881, defining the term "merchants," is incorporated word for word into Section 28 of the Assessment Law of 1899, above set out.

In construing the Assessment Law of 1881, the Supreme Court of Tennessee, in the case of Taylor v. Vincent (12 Lea 282), said:

> "We have carefully considered the question, and our conclusion is that a manufacturer who sells articles manufactured by him, the articles being the product of the growth of the State, is not a dealer in such articles. * * * We hold that a dealer is correctly defined by the Supreme Court of Pennsylvania in the case of Commonwealth v. Campbell (9 Casey 386), as a middleman, between the manufacturer or the producer and the consumer; or, as said by Judge Black in Norris Bros. v. Commonwealth (3 Casey 495), 'a dealer, in the proper acceptation or sense of the word, is not one who buys to keep, or makes to sell, but one who buys to *sell again*. He stands immediately between the producer and the consumer, and depends for his profits not upon the labor he bestows on his commodities, but on the skill and foresight with which he watches the markets.' In other words, a manufacturer of an article from the raw material, though he sells the article thus manufactured in unbroken packages to dealers, is not a wholesale dealer under these revenue statutes."

BRIEF.

In considering how far this court is concluded by the decisions of the court of last resort in a State, plaintiff in error maintains that the following legal propositions are now so well established as to place them beyond the pale of legal controversy.

I.

Where the construction of the Constitution of the State or the statutory law of a State is involved, this court will follow the uniform decisions of the court of last resort in such State, and will adopt its interpretation, notwithstanding this court would have reached a different conclusion from an application of the principles of general jurisprudence.

Morley v. Lake Shore, etc., Ry. Co., 146 U. S. 162.
Miller v. Swann, 150 U. S. 132.
Baltimore Traction Co. v. Baltimore Belt R. R. Co., 151 U. S. 137.
Marchant v. Pennsylvania R. R. Co., 153 U. S. 380.
Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.
Aberdeen Bank v. County of Chehalis, 166 U. S. 440.
Wilson v. North Carolina, 169 U. S. 586.
Bank v. Skelly, 1 Black 436.
Christy v. Pridgeon, 4 Wallace 196.

II.

Where the construction of a local statute is involved, and it appears that the court of last resort in the State, has, previously to the controversy, placed an interpretation

on such local statute different from the interpretation placed on it in the pending suit, then this court may adopt either one or the other construction, in accordance with its own opinion of the rules of general law which should govern the case.

Roberts v. Northern Pacific R. R. Co., 158 U. S. 1.

Wilson v. Ward Lbr. Co., 67 Fed. Rep. 674.

National Foundry and P. Wks. v. Oconto Water Co., 68 Fed. Rep. 1006.

Knox County v. Ninth Nat'l Bank, 147 U. S. 91.

Bartholomew v. City of Austin, U. S. App., 85 Fed. Rep. 359.

Jones v. Great Southern Fire Proof Co., 86 Fed. Rep. 370.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. Rep. 296.

III.

Where the decision of a court of last resort in a State is adverse to some right claimed under the Constitution of the United States, or some law of Congress, and such decision does not involve the construction of the Constitution of such State, or any of its local laws or usages, but the claim of right is denied on the opinion of such State court as to the principles of general law applicable to the case, then such decision is not a precedent binding on this court, and the Federal questions presented will be determined by this court according to its own independent judgment of the principles of general jurisprudence involved in the controversy.

Boyce v. Tabb, 18 Wallace 546.

Olcott v. The Supervisors, 16 Wallace 678.

Swift v. Tyson, 16 Peters 1.

Willis v. Board of Commissioners, 86 Fed. Rep. 872.

Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. Rep. 201.

IV.

Where a party brings a case on writ of error to the court of last resort in a State, and claims that he has been deprived by the decision of such court of some right secured to him under the Constitution of the United States, then this court becomes the exclusive and final arbiter of such Federal question, and will, after giving the opinion of the State court respectful consideration, decide the case for itself, independently of any construction which such court of last resort may have placed on the Constitution, or local laws and usages of such State.

Scott v. McNeal, 154 U. S. 34.

Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112.

Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244.

Central Trust Co. v. Citizens' Street Ry. Co., 82 Fed. Rep. 1.

State Bank of Ohio v. Knoop, 16 Howard 369.

COMMERCE "AMONG THE SEVERAL STATES."

Subsection 3, of Section 8, Article 1, of the Constitution of the United States, providing that Congress shall have power "to regulate commerce among the several States * * *," presents a problem of momentous and growing importance, in the solution of which this court has rendered many opinions affecting in a marked degree the welfare of the whole country. From the adjudicated cases plaintiff in error adduces the following propositions of law, which it maintains have met with the approval of the court:

I.

Subsection 3, Section 8, Article 1, of the Constitution of the United States, in its application to a subject which is "national in its character, and admits and requires uniformity of regulation affecting alike all the States," when properly construed, means that Congress alone has the power to provide such regulations as the exigencies of commerce may require, and the absence of any legislation on the subject is equivalent to a declaration by Congress that commerce, as to that subject, shall be free. The importation of goods from one State into another is a subject of national importance, affecting the welfare of the whole country, and, therefore, the absence of any law of Congress in respect to an article which is the subject of interstate commerce, operates as an affirmative declaration that the importation of that article shall be free of any regulation or restriction whatever by the State into which such article is imported.

Brown v. Houston, 114 U. S. 622.

Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 507.

Leisy v. Hardin, 135 U. S. 100.

Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577.

II.

Goods imported from one State into another are the subjects of interstate commerce, and in the absence of any law of Congress, they will remain under the protection of the Federal Constitution exempt from any regulation or interference on the part of the State into which they are imported, until the status of such goods is changed by mingling them with the general property of the State, and

thereby terminating their character as subjects of interstate commerce.

Brown v. Maryland, 12 Wheaton 436.
Leisy v. Hardin, 135 U. S. 100.
Lyng v. Michigan, 135 U. S. 161.

III.

The power to tax is the power to destroy, and, therefore, the taxation of the subjects of interstate commerce is a regulation of "commerce among the several States," inhibited by the Constitution.

Lyng v. Michigan, 135 U. S. 161.
Leloup v. Mobile, 127 U. S. 640.
Bowman v. Chicago & Northwestern Ry. Co., 125 U. S. 465.
Weston v. Charleston, 2 Peters 449.
Postal Tel. Co. v. Adams, 155 U. S. 688.

IV.

The constitutionality of a tax imposed by a State is not to be determined by the manner of its imposition, or the agency through which it is collected, but by the subject on which the tax is imposed. If the tax operates as a burden on a subject of interstate commerce, it is obnoxious to the Federal Constitution, without regard to its character or the method of its enforcement.

Telegraph Co. v. Texas, 105 U. S. 460.
Cook v. Pennsylvania, 97 U. S. 566.
State Freight Tax, 15 Wallace 232.
Bank Tax Case, 2 Wallace 200.
Bank of Commerce v. New York, 2 Black 620.

V.

As long as goods imported from one State into another remain in the original packages in which they were transported, they will continue the subjects of interstate commerce, and the owner of the goods, in the absence of any law of Congress, may sell them in the original packages in the State into which they are imported, without restriction, interference or regulation by such State.

Brown v. Maryland, 12 Wheaton 436.
Leisy v. Hardin, 135 U. S. 100.
Lyng v. Michigan, 135 U. S. 161.
May v. New Orleans, 178 U. S. 496.
Schollenberger v. Pennsylvania, 171 U. S. 1.
Pabst Brewing Co. v. Terre Haute, 98 Fed. Rep. 330.

VI.

The original package of commerce is a package, bundle or aggregation of goods put up for convenience of transportation into whatever covering or receptacle the importer may elect, and delivered by him to the carrier at the initial point of shipment, to be transported from one State into another; and where a number of smaller packages are, for convenience, placed within a larger package, or bound together in a bundle, such bundle or larger package will constitute the original package of commerce; and when the bundle is unbound, or the larger package opened, in order to expose the smaller packages for sale, the goods will become mingled with the general property of the State and cease to be subjects of interstate commerce.

May v. New Orleans, 178 U. S. 496.
Schollenberger v. Pennsylvania, 171 U. S. 1.
Leisy v. Hardin, 135 U. S. 100.

Sawrie v. State of Tennessee, 82 Fed. Rep. 615.
Keith v. The State, 10 L. R. A. 430.
McGregor v. Cone, 39 L. R. A. 484.
Guckenheimer v. Sellers, 81 Fed. Rep. 997.
Austin v. State, 17 Pickle (Tenn.) 563.

VII.

When goods designed for exportation from one State into another State start on their journey at the initial point of transportation, they at once become subjects of interstate commerce, and are protected by the Federal Constitution from any interference or regulation by any State through which they may pass, until they reach their ultimate destination, notwithstanding, on the way, they may be delayed for a reasonable time on account of inadequate means of transportation, or for reshipment, or assortment, or distribution, or on account of any accident, or any other cause which may supervene to prevent the goods going directly from the initial point of shipment to the point of destination.

Coe v. Errol, 116 U. S. 517.
The Daniel Ball, 10 Wallace 557.
Howe Machine Co. v. Gage, 10 Otto 676.
Diamond Match Co. v. Ontonagon, 188 U. S. 82.
Kelley v. Rhoads, 188 U. S. 1.
Caldwell v. North Carolina, 187 U. S. 622.
State v. Engle, Receiver, 5 Vroom (N. J.) 425.
State v. Carrigan, 10 Vroom (N. J.) 35.
Passenger Cases, 7 Howard 405.
Head Money Cases, 112 U. S. 580.
New York v. Compagnie, 107 U. S. 59.

VIII.

As the absence of legislation on the part of Congress is equivalent to a positive declaration that interstate commerce shall be free, it follows that its subjects may be transported from one State into another, and there sold in the original packages, without the imposition of burdens of any kind, and that the imposition of a tax on such subjects by the State into which they are imported, cannot be justified or upheld on the ground that the tax is equal and applies impartially to all goods of like character within the limits of such State.

Robbins v. Shelby County Taxing Dist., 120 U. S. 489.

Leloup v. The Port of Mobile, 127 U. S. 640.

Asher v. Texas, 128 U. S. 129.

Stockard v. Morgan, 185 U. S. 27.

IX.

When goods imported from one State into another, whether in the original packages of commerce or not, are, by the State into which they are imported, made subjects of an invidious and discriminating tax, because of their foreign origin, the Federal Constitution will intervene to protect them from such invidious or discriminating tax, and its protection will continue as long as the goods can be identified, and the invidious discrimination exists.

Welton v. The State of Missouri, 91 U. S. 275.

Brown v. Maryland, 12 Wheaton 436.

Woodruff v. Parham, 8 Wallace 123.

State Freight Tax, 15 Wallace 232.

Minneapolis Brewing Co. v. McGillivray, 104 Fed. Rep. 258.

ARGUMENT.

THE CHARACTER OF THE ASSESSMENT, AND ITS RELATION TO THE FEDERAL QUESTIONS PRESENTED BY THE ASSIGNMENTS OF ERROR.

Whether plaintiff in error is a manufacturer or a merchant is immaterial, as an independent proposition, to the discussion in this court. If no Federal question is presented in the record, then the decision of the Supreme Court of the State, however erroneous, is conclusive. But, insofar as it may be necessary to determine the occupation of plaintiff in error, in order to reach a correct solution of the Federal questions involved, the inquiry is pertinent. The contention of the defendant in error is, that as the Supreme Court of the State has adjudicated that plaintiff in error was a *"merchant"* doing business at Memphis, this court is concluded by the decision, and must, in the disposition of the Federal questions presented, proceed in its deliberations on the assumption that plaintiff in error is a *"merchant,"* and not a manufacturer, however erroneous this court might regard the decision, if it was not precluded from reaching a different result.

In answer to this contention, plaintiff in error insists that this court is unrestricted, by Section 34 of the Judiciary Act, from an independent inquiry into the character of its occupation, and this court will determine for itself whether plaintiff in error be a merchant or manufacturer.

First: As far back as 1844, the Supreme Court of Tennessee, in the case of The State v. Smith (5 Hump. 394),

had occasion to define the term *"merchant,"* and, quoting with approval the definintion given in Tomlin's Law Dictionary, added, "from this definition it seems the business of buying and selling should be the pursuit and vocation of a party by which he makes his living, in order that he should be regarded as a merchant."

Section 28, of the Assessment Law of 1899, defining the term *"merchant"* to mean "one engaged in trading or dealing in any kind of goods, wares and merchandise," was embodied word for word in every assessment law passed by the General Assembly of the State for twenty years preceding the act of 1899. The Supreme Court, in Taylor v. Vincent (12 Lea 282), adopted the language of the Supreme Court of Pennsylvania in Norris Bros. v. Commonwealth (3 Casey 49), and held that a "dealer is not one who buys to keep, or makes to sell, but one who buys to sell again." So we have the Supreme Court of Tennessee, in 1844, defining a *"merchant"* to be "one engaged in the business of buying and selling;" in 1881, and since that time down to the present, we have Section 28 of the Acts of 1899, embodied in every assessment law of the State, defining a *"merchant"* to be *"one engaged in trading or dealing in any kind of goods, wares and merchandise,"* and, lastly, in 1883, after Section 28 became law, we have the decision of the Supreme Court, in Taylor v. Vincent, defining a *"dealer"* to be *"one who buys to sell again."* These definitions are all synonymous, and the exact definition given by the lexicographers. For the first time in the judicial history of the State, the Supreme Court, in this case, has decided that a manufacturer who sells his manufactured products thereby becomes a merchant. It was held in Kurth v. The State (2 Pickle 134), that a manufacturer engaged in sell-

ing his manufactured products might be required to pay a privilege tax on the *"occupation of selling;"* but nowhere, prior to the decision in this case, did it ever decide or intimate that a manufacturer engaged in selling his products was a merchant, and liable to pay an *ad valorem* merchant's tax.

When, in 1900, plaintiff in error selected Memphis as the point for the distribution of its goods in the Southwest, it had the right to assume that the Supreme Court of the State would adhere to the correctness of its adjudications, and now that it has, in this case, decided otherwise, it is confidently insisted that this court is not concluded by the later decision in this cause, but will follow the former decisions, if found to be in accord with its independent judgment.

In this connection it is appropriate to call attention to the difference between an *ad valorem* or property tax assessed against merchants, and an *ad valorem* or property tax assessed against manufacturers.

Section 28, of the Acts of 1899, provides for the assessment of the merchant's property tax, and another section, not copied, requires the clerk of the County Court to make the assessment, whereas Section 23 of the same act provides for the assessment of the manufacturer's property tax, and another section, not copied, requires the county assessor to make the assessment. Section 5, of the Assessment Law of 1899, which is embodied in all of the assessment laws from 1881 down to the present time, provides that property shall be assessed—

> "to the person or persons owning or claiming to own the same on the 10th day of January of the year for which the assessment is made."

On page 57 of the record will be found a statement showing the amount of goods belonging to plaintiff in error stored in Memphis on the first day of each month since February, 1900. On the same page will be found the correspondence between plaintiff in error and the Patterson Transfer Company, showing that the arrangement was not entered into between the parties, under which the goods were first consigned to Memphis, until January 30, 1900. By reference to the receipt of the clerk given for the taxes paid under protest (Record, p. 11), it will be seen that the clerk, under Section 28, in making the assessment, added the highest and lowest valuations of property stored with the Patterson Transfer Company during the year, divided the sum by two, and thus arrived at the assessment on a valuation of $72,326. Assuming plaintiff in error to be a merchant, this assessment was proper; but, assuming it to be a manufacturer, it was grossly erroneous, because on the 10th day of January, 1900—the date on which the law requires the property of a manufacturer to be assessed—there was not one dollar's worth of property belonging to plaintiff in error in Tennessee on which an assessment could be made.

In the same way the clerk made an assessment for the year 1901, on a valuation of $166,275; but, on reference to the statement above referred to, it will be found by simple calculation that the entire property of plaintiff in error stored at Memphis on January 10, 1901, was only valued at $86,602.50.

It may not be material to the controversy to show this difference, but it illustrates the method of taxation, and the enterprise of a back tax assessor in Tennessee.

Second: The definition of the word *"merchant,"* being correctly given in the Tennessee statute—as the term is un-

derstood by lexicographers and law writers—is this court concluded by a definition wholly different given to it by the Supreme Court of the State, or will it decide for itself the meaning of the term? If the statute of the State accurately defines the word *"merchant,"* will this court follow the Supreme Court of the State when it decides that the statute, when properly construed, means a *manufacturer?*

It is insisted that this is simply a question of general law, and this court will determine it in accordance with its own ideas of commercial jurisprudence.

Third: Plaintiff in error insists that the manufacturer of goods in another State has the constitutional right to import them into Tennessee, there store them, and sell them in the original packages, and, until sold, they are the subjects of interstate commerce, and not subject to taxation. To this defendant in error replies, that whatever may be the rights of a manufacturer in such case, the exemption does not extend to a merchant who imports goods into Tennessee, places them in his general stock, and is engaged in selling them in the original packages, or otherwise, to the trade. Therefore, in determining the Federal question presented by the second assignment of error, it may be material to inquire whether plaintiff in error is a merchant or a manufacturer.

Fourth: Plaintiff in error again insists that it is largely engaged in the manufacture of nails, staples, barbed and smooth wire at various points in other States, and while its manufactured products were *in transitu* through Tennessee, and necessarily detained there for the purposes of assortment and distribution, they remained the subjects of interstate commerce, and were protected from taxation on the part of the State. To this defendant in error makes

answer, that it is true goods *in transitu* from one State to another are not subject to taxation; but that plaintiff is not a *manufacturer*. but a *merchant*, and, as a merchant, imported the goods, and their journey ended when they were placed in its stock of merchandise at Memphis, where it was doing business. Therefore, in the solution of the Federal question presented by the third assignment of error it is important to determine whether or not plaintiff was a *manufacturer* or a *merchant*.

Fifth: Again, plaintiff in error insists that if the goods imported by it into Tennessee from other States, consisting of nails, staples, barbed and smooth wire, had been manufactured in Tennessee out of the produce of that State, that they would have been exempt from taxation under Section 30, Article 2, of the Constitution of the State, which provides, "that no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees," and that to tax the goods of plaintiff would be to impose a burden on them because of their foreign origin, and, for that reason, obnoxious to the Constitution of the United States. To this contention defendant in error replies, that the General Assembly of the State of Tennessee has enacted a law declaring that Section 30, of Article 2, of the Constitution, applies only to goods in the *"hands of the manufacturer,"* and that the Supreme Court of the State has repeatedly decided that such was the proper construction of that provision of the Constitution. So it is that the defendant in error is driven to the insistence that, at the time the assessment was made, the goods were no longer in the *hands* of plaintiff in error as a *manufacturer*, but had passed from the *hands* of plaintiff in error as *manufacturer* into the *hands* of plaintiff in error as *mer-*

chant, and hence were no longer exempt, but subject to pay both a merchant's *ad valorem* and a merchant's privilege tax. So it will be seen that, in deciding the Federal question presented by the fourth assignment of error, this court must necessarily determine for itself whether plaintiff in error owned the goods in the capacity of a merchant, or held them in its *"hands"* as a manufacturer.

Pertinent to this branch of the case we quote from the decision of this court in the recent case of Stockard v. Morgan (185 U. S., p. 37):

> "Although it is said in the opinion of the State court herein that the thing taxed is the occupation of merchandise brokerage, and not the business of those employing the brokers, yet we have seen from the cases already cited that when the tax is applied to an individual within the State selling the goods of his principal who is a non-resident of the State, it is, in effect, a tax upon interstate commerce, and that fact is not in anywise altered by calling the tax one upon the occupation of the individual residing within the State while acting as the agent of a non-resident principal. The tax remains one upon interstate commerce, under whatever name it may be designated."

We conclude that this court is absolutely unhampered and unrestricted in the exercise of its rightful jurisdiction for the protection of the citizen in his rights under the Constitution of the United States, and, to accomplish that end, it will brush aside all disguises and pretexts whatsoever, and whether the infraction is by the legislative, executive or judicial branch of the State government, it will proceed directly to inquire whether, in effect, the rights of the citizen under the Federal Constitution, have been violated, and if they have been, it will administer the appropriate relief.

The question, then, is: First, whether, in point of fact, the goods of plaintiff in error were the subjects of interstate commerce; and, second, whether the State levied and collected taxes on those goods over its protest. If the answer is in the affirmative, the case is with plaintiff in error; otherwise, it is not entitled to relief.

The first and fifth assignments of error are general in their application; but the second, third and fourth are specific, and present with exactitude the Federal questions involved in the discussion.

SECOND ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT THE SUBJECTS OF INTERSTATE COMMERCE, BECAUSE IMPORTED INTO TENNESSEE IN THE ORIGINAL PACKAGES OF COMMERCE, AND THERE OFFERED FOR SALE IN THE ORIGINAL PACKAGES.

The findings of fact by the Supreme Court of the State brings this case exactly within the rule laid down in Brown v. Maryland, Leisy v. Hardin, and Lyng v. Michigan, and other cases cited in the brief, and these cases must be overthrown in order to hold that the goods of plaintiff were not the subjects of interstate commerce, and were properly the subjects of taxation.

The goods, for convenience of transportation, were made up at the factories—the initial points of shipment—in the following packages, towit: The nails and staples in kegs, each weighing one hundred pounds; the smooth wire in coils tied by wire, and each coil weighing one hundred pounds, and the barbed wire on reels, each reel weighing

one hundred pounds. Each package was made up and shipped separately from every other package, and each was appropriately marked, showing exactly what it was. The goods were consigned to plaintiff in error at Memphis, remained the property of plaintiff in error at Memphis, and were there stored in the original packages, at the time of the assessment, in warehouses rented for that purpose, separately and apart from all other property in Tennessee.

Plaintiff in error can add nothing to the reasoning of this court in the cases cited in support of its insistence that goods thus shipped, received and stored in the original packages, were protected from taxation under Subsection 3, Section 8, Article 1, of the Federal Constitution, until they were sold in the original packages, and thereby mingled with the general mass of property in the State.

Defendant in error, in answer to the contention presented by the second assignment of error, insists that the rule relied on by plaintiff in error has reference to imports from foreign countries, and has no application to imports from a sister State, and that the rule applicable to this case is, that where goods are transported from one State into another, and there offered for sale, they may be taxed even in the original packages in which they were transported, provided the tax is uniformly and impartially assessed on all like property in the State, and in no case would the tax be obnoxious to Subsection 3, Section 8, Article 1, of the Federal Constitution, unless it was discriminating, and imposed because of the foreign origin of the goods. In support of this contention the following cases are relied on by plaintiff in error:

Woodruff v. Parham, 8 Wallace 123.

Hinson v. Lott, 8 Wallace 148.

Brown v. Houston, 114 U. S. 622.

Pittsburg & Southern Coal Co. v. Bates, 156 U. S. 577.

It is now insisted by plaintiff in error that insofar as these cases, or any of them, conflict with its contention set forth in its second assignment of error, they have been, by implication, at least, overruled.

First: It is true that the case of Brown v. Maryland had reference to goods imported from a foreign country, and the opinion of Chief Justice Marshall to the effect that the same rule was applicable to goods imported from a sister State might be considered *obiter dictum.* However, that opinion has since been repeatedly approved and adopted by this court, and especially in the cases of Leisy v. Hardin, and Lyng v. Michigan, in which Justice Miller, who delivered the opinion of the court in Woodruff v. Parham and Hinson v. Lott, concurred.

The rule as stated by Chief Justice Marshall has been so often recognized and adopted by the courts, Federal and State, throughout the country that it may now be considered as permanently established as a rule entering into the very life and wellbeing of interstate commerce.

Second: As the country develops, and the volume of interstate commerce increases, it becomes more and more apparent that the rule stated in Woodruff v. Parham and Hinson v. Lott, that all taxes levied on goods imported from other States were without constitutional objection, provided the taxes were uniform and equal, is no longer tenable. It was distinctly denied in Robbins v. Taxing District, Asher v. State, and Stockard v. Morgan. It is a coincidence that the Chief Justice, in delivering the opinion of the court in Lyng v. Michigan, advanced the

same cogent reasons for denying this rule as were given by Justice Nelson in delivering the dissenting opinion in Woodruff v. Parham, and yet Justice Miller, who delivered the opinion of the court in Woodruff v. Parham and Hinson v. Lott, more than twenty years thereafter, concurrred in the opinion delivered by the Chief Justice in Lyng v. Michigan.

When it is considered that the country now extends from Alaska to the Philippines, and from ocean to ocean—embracing all latitudes and altitudes, and all varieties of climate, soil and production—we can comprehend in some degree the scope of our domestic commerce, and the result which would follow if the rule laid down in Woodruff v. Parham and Hinson v. Lott was enforced by this court. Each State has its advantages and its limitations, and the prosperity of each depends, in a large measure, on selling to other States its surplus products, and buying from other States products which it does not produce sufficiently to meet its wants. This situation offers a powerful inducement for each State, if not restrained, to tax those products which it does not produce, or produces inadequately, and thereby attempt to derive its revenue by methods which would operate to relieve its own people from the burdens of taxation, and impose them on the people of other States. In this way most of the evils affecting domestic commerce prior to the adoption of the Constitution, would be revived, and the only escape from the disastrous consequences would be for the courts to inquire into the motive of each State in passing such laws, and to hold that, notwithstanding they were apparently equal and impartial, as matter of fact, they were discriminating, and, therefore, obnoxious to the Federal Constitution. It

is hardly necessary to add that such an inquiry would lead to interminable confusion, and is altogether impossible as a solution of the problem.

It is admitted that the correct rule was stated in Robbins v. Shelby County Taxing District, in which this court held that—

> *"interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State."*

Third: Again, this court has repeatedly held that silence on the part of Congress is equivalent to a declaration that interstate commerce shall be free. It has also repeatedly held that goods imported in the original packages of commerce from one State into another, were the subjects of interstate commerce, until they were sold in the original packages, and were thereby commingled with the general mass of property in the State into which they were imported. Assuming these propositions to be true, then it would be impossible for the other proposition to be true, that the State into which the goods were imported could tax the goods in the original packages, provided the law was uniform and equal—imposing a similar tax on like property throughout the State—because, in that case, the freedom of interstate commerce would not depend on the silence of Congress, but on the will of the taxing power in the several States.

Fourth: The cases of Brown v. Houston and Pittsburg & Southern Coal Co. v. Bates are not in conflict with Leisy v. Hardin and Lyng v. Michigan, and other cases cited in the brief. The rule applicable to the *original packages of commerce* was not involved in these cases, but

rather the rule applicable to goods *in transitu*. In both cases the court assumed the coal was not offered for sale in original packages, and held that it was no longer *in transitu*, and having been offered for sale in the open market, it was mingled with the property of Louisiana, and, therefore, subject to taxation.

The case of May v. New Orleans (178 U. S. 496), fairly illustrates the meaning and scope of the decisions referred to. In that case the box in which the goods were imported was held to be the original package, and not subject to taxation; but as soon as the original package was broken, and the smaller packages were taken out and offered for sale, then immediately the contents of the box became mingled with the property of the State, and were subject to taxation. Now, in Brown v. Houston and Pittsburg & Southern Coal Co. v. Bates, the barges in which the coal was shipped down the Ohio and Mississippi rivers belonged to the owners of the coal, and the owners of the coal did not offer for sale the barges containing the coal, but the *coal out of the barges*. Had the coal been packed and enclosed in the barges, and each barge properly identified as containing so much coal, then the barge would have been the original package of commerce, and the owner of the barges could have floated them to Louisiana, and there offered them for sale with their contents, and they would have been protected from taxation as subjcts of interstate commerce.

THIRD ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT THE GOODS OF PLAINTIFF IN ERROR WERE NOT IN TRANSITU FROM THE INITIAL POINT OR POINTS OF TRANSPORTATION TO THE PLACE OR PLACES WHERE THEY WERE TO BE DELIVERED TO THE PURCHASERS FROM PLAINTIFF IN ERROR.

The question for discussion presented by the third assignment of error is, whether, according to the findings of the court below, the goods were *in transitu* when the assessment was made. It is certain that the goods had all left the initial points of shipment, and that none of them had arrived at their destination when they were assessed; that it was the intention of plaintiff in error from the moment the goods left the initial points of shipment until they were ultimately delivered to the purchasers, they should remain in the hands of common carriers; that the goods were all practically sold before they reached Memphis, and nearly all of them before they were produced at the factories; that plaintiff in error had a number of mills, widely separated, engaged in the production of its goods; that it was necessary to assemble and assort these goods for distribution; that Memphis was the point chosen for the distribution; that the Patterson Transfer Company—a common carrier—was employed to receive the goods at Memphis, there assort them, and either deliver them on the orders of plaintiff in error to jobbers in Memphis, or jobbers doing business beyond the limits of Tennessee; that the Patterson Transfer Company, finding it inconvenient to assort the goods at the steamboat landings or

railroad depots, rented warehouses where they were temporarily stored until they could be assorted and distributed as plaintiff in error might direct; that the goods so sold were all embraced in various contracts of sale by which different jobbers agreed to buy the goods, subject to delivery in sixty or ninety days, and the goods were to be delivered in pursuance of specifications made out by the buyers on the orders of plaintiff in error; that the Patterson Transfer Company had no authority to sell the goods; knew nothing of the price at which they were sold; never held the goods out for sale, and never received payment therefor; but acted strictly within the scope of its business as a common carrier; that plaintiff in error never, at any time, held its goods out for sale at Memphis; that the goods consigned to Memphis, and assorted and distributed by the Patterson Transfer Company were not unreasonably delayed at Memphis, and never at any time beyond the life of the contracts under which they were to be delivered; that the goods, and no part of them, were purchased by plaintiff in error, but were all the products of its own factories, and that only ten per cent. of all the goods consigned to and assembled at Memphis, were distributed to jobbers in Memphis, and the remaining ninety per cent. were delivered to jobbers doing business beyond the limits of Tennessee. It is insisted that these facts bring the case clearly within the authorities cited in the brief.

The case of State v. Carrigan (10 Vroom (N. J. 35), is analogous to the one under discussion. In that case the Supreme Court of New Jersey held that coal mined in Pennsylvania and shipped to Port Johnson, and there stored in bins for reshipment to New York, was *in transitu*, and not subject to taxation.

The case of The State v. Engle (5 Vroom (N. J. 425), is even stronger. It seems that in that case coal had been shipped from Pennsylvania across the State of New Jersey to Elizabethport, where it was being assorted preparatory to reshipment to other points. The court said:

> "The power of the State to tax the subjects of commerce where their transit, for the purposes of commerce, has ceased, and they have become incorporated and mixed with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another State, in its transit to market in other States, which is delayed within this State, not for the purposes of sale, but merely for separation and assortment, for the convenience of shipment to its destination, is a tax on commerce among the States, is too plain to require argument. It is not the mode in which the tax is imposed, nor the person against whom it is assessed that determines whether the taxation is within the power of the State. The situation of the property, and the effect of the imposition on the price of the articles as between the owner and the purchaser—citizens of other States—are the circumstances upon which the question must be decided."

FOURTH ASSIGNMENT OF ERROR.

THAT IN AND BY SAID DECREE, SO ENTERED BY THE SUPREME COURT OF TENNESSEE, SAID COURT PROCEEDED ERRONEOUSLY TO HOLD THAT SAID ASSESSMENT DID NOT OPERATE TO DISCRIMINATE BETWEEN PLAINTIFF IN ERROR, A CITIZEN OF THE STATE OF NEW JERSEY, WHOSE GOODS WERE MANUFACTURED OUT OF THE PRODUCE OF OTHER STATES, BECAUSE OF THEIR FOREIGN ORIGIN, AND SIMILAR GOODS MANUFACTURED OUT OF THE PRODUCE OF TENNESSEE.

Section 30, Article 2, of the Constitution of Tennessee, provides that "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees."

The Supreme Court of the State, in March, 1902, delivered an opinion in the case of Benedict et. al. v. Davidson County, reported in Volume 67 of the Southwestern Reporter, page 806, in which this provision of the Constitution is construed. The opinion was delivered by Justice Wilkes, and is as follows:

"This cause was heard upon demurrer in the court below. The demurrer was overruled, and the defendants have appealed to this court, and assigned errors.

"The defendants are the County of Davidson, the mayor and city council of Nashville, and Len K. Hart, trustee of Davidson county. The case, as made by the bill, is that Benedict Bros. are residents of Davidson county, and are now, and have been for twenty years past, manufacturers and dealers in lumber; their place of business being Nashville, Tenn. They are called upon by the tax assessors for a statement of personalty taxable in their hands on the 10th of January, 1900. They refused to list as taxable a quantity of logs and lumber which they had in their yards on that day, which lumber had been manufactured from logs cut from their own lands in the State of Tennessee, and from logs which had been bought by them from other persons owning lands in the State, and upon which the logs grew. Thereupon the tax assessors for the county and city assessed complainants as owning personalty consisting of lumber and logs to the amount of $18,000. The State tax was paid under protest by complainants, and the present suit is to recover back the tax thus paid for State purposes from the trustee, and to enjoin the collection of the taxes assessed for county and municipal purposes. It is claimed by complainants that the property thus assessed is exempt from taxation under Sections 28 and 30, of Article 2, of the Constitution of Tennessee. The assessment law in force at the time of this assessment is chapter 435 of the Acts of 1899, and by Section 2, Subsection 5, of the act it is provided that 'all growing crops of whatever nature or kind, the direct product of the soil of this State in the hands of the producer, or his immediate vendee, and

manufactured articles from the produce of this State, in the hands of the manufacturer, shall be exempt from taxation.' Section 28, of Article 2, of the Constitution of the State, contains the following words: 'All property—real, personal or mixed—shall be taxed; but the Legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held or used for purposes purely religious, charitable, scientific, literary or educational, and shall except $1,000 worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer and his immediate vendee.' Section 30 of the same article is as follows: 'No article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees.' So far as these provisions relate to the direct product of the soil, in the hands of the producer and his immediate vendee, and to articles manufactured of the product of this State, they are mandatory and self-executing. Complainants claim exemption from taxation upon the property assessed under and by virtue of each of these provisions of the Constitution, as well as the terms of the Act of 1899. Without construing the language and provisions of Section 28, above set out, which we think not necessary in this case, we proceed to inquire whether the property thus assessed is exempt under the provisions of Section 30.

"It is difficult to give a correct definition of the terms 'articles manufactured of the produce of the State.' It is evident that they are not the same as the direct product of the soil in the hands of the producer or his immediate vendee. The direct product of the soil is necessarily, in every instance, the produce of the State, but it does not follow that the produce of the State is confined to the direct products of the soil. And while the direct product of the soil is necessarily embraced within the terms 'produce of the State,' it may not fall within the definition of 'an article manufactured of the produce of the State.' To illustrate: Wheat is a direct product of the soil, but it is not an article manufactured of the produce of the State. Flour made of wheat grown upon Tennessee soil is an article manufactured of the produce of

the State, but it is not a direct product of the soil, though manufactured out of the direct product of the soil. Wheat grown on Tennessee soil is exempt, under the provisions of Section 28, *supra*, while flour, manufactured of such wheat is not, but is exempt only under Section 30. It is worthy of note that the exception contained in Section 30, of 'articles manufactured of the produce of the State,' originated with the Constitution of 1796, and was brought forward into the Constitutions of 1834 and 1870 in substantially the same language, while the exemption in Section 28 of the direct products of the soil, in the hands of the producer or his immediate vendee, originated with, and is first found in, the Constitution of 1870. It is a fair inference that our Constituion makers of 1870 did not consider the terms as the equivalent of each other, and that they intended, by incorporating both provisions in the Constitution of 1870, to make an exemption under Section 28, which had not previously existed under Section 30. We are of opinion that the term 'produce of the State' is intended to embrace whatever is produced or grown in the State, or is the yield of the State, whether it be crops, or timber, or coal, or iron, or marble, or wool, or any other article which may be treated as produced or grown within the State from or on the soil, or may be found in the soil. It must be noted, however, that it is not 'the produce of the State' which is exempt under Section 30, but 'articles manufactured of such produce.' So that it becomes necessary to decide what is an article manufactured, within the sense of this provision. The ordinary definitions of the word 'manufactured' can aid us but little. There will be no dispute but that an article (for example, a piece of furniture), when reduced to its finished state, as a table, would, in the hands of the manufacturer, come under the head of a 'manufactured article,' after it has gone through the many stages to reach that condition. And the troublesome question is, When did it become manufactured? Originally the tree out of which the material came was growing in the forest. This tree, with saw or ax, was felled to the ground. Next it was cut into lengths or logs, and in that shape became a merchantable article. These were transported to the

mill and sawed into rough lumber. This rough lumber was afterwards ripped into desirable sizes and lengths. Then the material went through a planing or smoothing process; then a process of adjusting or jointing the pieces one to another; then a process of being fastened in shape; next a polishing process—it may be, an oil or varnish finish, and other manipulations known to the trade for converting the crude material into handsome and useful shapes and appearances, ultimately designed as 'furniture,' and all these different processes may have been conducted by different parties. Now, at what stage of this process does the article become exempt as a manufactured article? Evidently the purpose of the exemption is to encourage manufacturing, and the pertinent question is, shall a construction be placed upon the clause which virtually says that, when the last finishing strokes have been put upon the article, it becomes exempt in the hands of the manufacturer, and not until then, or shall we say the exemption begins when the first act of manufacturing is done, or at some intermediate stage? Did the makers of the Constitution mean to say to the manufacturer: 'Your product shall be exempt in your hands if by your good fortune it can reach the finished stage, but, if by my good fortune and the aid of my machinery, I can catch the material in any intermediate stage between the log and the table, you must pay taxes upon it. In other words, you, the manufacturer, and you, the tax gatherer, shall start on equal terms when the log is placed on the yard of the mill manufacturer. It must then be a race of diligence between you from that time to the time the table is finished and ready for market. If you, the manufacturer, can by any means, open or secret, convert the log into the table before the tax gatherer catches you, then it is exempt; otherwise, it is not.' We cannot think this is a correct view. The process of manufacturing begins at least when the log is on the yard for the purpose of being sawed. When it is sawed into rough lumber, and when that is ripped into sizes and lengths, and when these are fastened together, and fitted one piece to another, and when the article is being polished, glazed, rubbed, or varnished —in all the stages from the time the log is on the yard until it appears finished by the manufacturer—the ex-

emption attaches and continues. Rough lumber and logs are articles of commerce, and for many purposes they are, in this condition, finished, and are not intended to be further manipulated; and so, also, is lumber which has been ripped into lengths or dressed for use. Logs are used in house or bridge building without further change. The exact question in this case is whether logs, in the hands of the mill-operating manufacturer, and the lumber, when cut by him into larger or smaller shapes and pieces, are exempt. We are not dealing with a condition where the owner of the tree has felled it, and cut it into lengths to be shipped to a foreign market and sold as logs; nor, on the other hand, are we dealing with the case of the same owner who may have felled his trees, and cut them into lengths in the forest, with a view of hauling them to his own mill, and then converting them by sawing them into lumber. Neither of these cases is presented. But we have the case of logs upon the yard of the sawyer or mill-operating manufacturer, ready to be sawed and lumber upon the yard already sawed. Nor are we dealing with the question of the taxability of the finished article after it has left the hands of the manufacturer and gone into the hands of the dealer or consumer. We express no opinion as to the application of the constitutional exemption to any of these conditions, as they are not involved in the present case. We do not consider the cases cited from California in point, as they turn upon different facts and different constitutional provisions, nor do we find any other authorities in conflict with this holding.

"We are of opinion that, under the facts in this record, the logs upon the yard, in the hands of the mill-operating manufacturer and his property, and lumber, rough and smooth, cut by him from such logs grown on Tennessee soil, are articles manufactured from the produce of the State, and exempt, under the provision of Section 30, Article 2, of the Constitution; and the demurrer was therefore properly overruled, and complainants, under the allegations of their bill, are entitled to recover back the taxes paid the State, and to perpetually enjoin the taxes assessed by the county and city; and the decree of the court below is therefore affirmed, and the cause remanded at costs of defendant for the appeal."

The findings of the Supreme Court of the State in this case show there are iron mines in Tennessee, and that the soil of Tennessee produces largely the material out of which plaintiff in error manufactures its goods. It is very clear that, if plaintiff in error was located in Tennessee, and its nails, staples, barbed and smooth wire were manufactured in Tennessee from iron mined in Tennessee, they would be, under this provision of the Constitution, exempt from taxation. It is equally clear, under the authorities cited in the brief, that to tax the goods of plaintiff in error manufactured from iron mined in other States, would be a discriminating tax, and obnoxious to Subsection 3, Section 8, Article 1, of the Constitution of the United States.

It is absolutely conclusive, under the construction of this provision of the Constitution of the State by the Supreme Court of Tennessee, that the goods of plaintiff in error were assessed on account of their foreign origin, and that therefore the assessment is a nullity. The only possible escape from this conclusion is to hold that plaintiff in error was a *merchant*, and not a *manufacturer*, or that the goods had passed from its "hands" as *manufacturer* into its "hands" as *merchant*, and that therefore it was in no position to insist that the assessment operated as a discrimination, because at the time the assessment was made they were not in the hands of plaintiff in error as the manufacturer of the goods.

But even this impossible contention under the decision just quoted would not, if maintained, operate to make the tax otherwise than a discriminating one, because in that case Benedict Bros., according to the statement of the court, were not only manufacturers of, but *dealers* in, lumber. Hence, assuming that plaintiff in error was a dealer

in its products, and, therefore, a merchant, the same result would follow.

CONCLUSION.

No student of the subject presented for determination by the assignments of error in this case can turn from it without increased reverence for the wisdom of the men who framed the Constitution, and increased veneration for Chief Justice Marshall, its first great expounder. Under the adjudications of this court, the provision that "Congress shall have power * * * to regulate commerce among the several States * * *," has, in the progress of time become the keystone of the arch upon which the prosperity of the American people depends. It has, more than any other, cemented the Federal Union, and is the source from which has sprung our domestic commerce, which now exceeds in volume all the international trade of the world. Great commonwealths, teeming with an enlightened population, and all the blessings and advantages of an advanced civilization, have sprung up in the heart of the continent, because they have free access to the markets of other States, to the harbors on our coasts, and, thence, to the markets beyond the seas.

Tennessee, the State to the Supreme Court of which the writ of error in this case runs, is no exception. Extending nearly five hundred miles across the continent, its people are accustomed to boast of their resources in agriculture, timber, iron, coal, marble and copper. Yet it nowhere touches the coast, and its development and prosperity depend on its reaching, without let or hindrance, the markets in other States, and, through our open ports, the markets of the world.

While the Constitution denies to a State the right to regulate commerce, it gives the power expressly to Congress. In construing the Constitution to mean that the silence of Congress is equivalent to the *declaration that commerce among the States shall be free,* this court leaves the way open for congressional interference, if the public welfare requires it. So the silence of Congress is also equivalent to the acquiescence of the American people, and to an expression of their will, that interstate commerce shall remain free and untrammeled.

Thus it is seen that this court, in dealing with this vital problem, has so interpreted the Constitution as not to jeopardize the public welfare. The power to regulate is lodged in Congress, and if Congress makes a mistake it can recall it. But if this court, in its interpretation of the meaning of the Constitution, makes a ruling detrimental to the public welfare, it establishes a precedent which is irrevocable. So it was, in the case of Leisy v. Hardin, the court having found that the beer stored in the original packages at Keokuk was a subject of interstate commerce, denied to the State the power to regulate it. By the passage of what is known as the Wilson Act, Congress so regulated the subject as to authorize the States to exercise the power denied by this court. If this act results harmfully, Congress can repeal it; but if this court had held otherwise the only way to correct the mistake would be for the court to reverse its ruling, or for the Constitution to be amended. This court has held that, in the absence of congressional action, commerce among the several States shall be free, and goods transported from one State into another, while in the original packages and until sold in the original packages, shall remain subjects of interstate commerce. Congress can in-

terpose, and, if it will, pass an act declaring that goods so imported from one State into another shall be subject to taxation in the original packages, provided the tax is uniformly and impartially imposed on all goods of like character in the State. Should Congress pass such an act, it could, at any time, recall or repeal it—the public welfare requiring it; but, if this court should so hold, its ruling would conclude Congress, no matter how disastrous to the public welfare the result might be.

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